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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-

MIDESSA TELEVISION COMPANY, INC. et al.,
Petitioners,

v.

MIDLAND TELECASTING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the first amendment and the Federal Communications Act of 1934 by implication preclude federal antitrust courts from exercising jurisdiction over a cable television system's failure to receive and carry to its subscribers a television broadcaster's programming.

2. Whether a cable television system's failure to initiate administrative proceedings or its failure to carry to its subscribers a television broadcaster's programming is a "restraint of trade or commerce" within the Sherman Act.

3. Whether a Court of Appeals should reverse a trial court's dismissal of the entire case by incorrectly stating that the trial court did not rule on one or more of the issues in the case.

PARTIES TO THE PROCEEDING

Plaintiff-Appellant: Midland Telecasting Company

Defendants-Appellees: Midessa Television Company, Inc.; Doubleday Broadcasting Company, Inc.; Tall City TV Cable Co.; Community Cablevision Company; Cablecom-General, Inc.; Hodge Enterprises; J. Howard Hodge, Deceased; Communicable of Texas, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Midessa Television Company, Inc., et al, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion below is reported at 617 F. 2d 1141 (5th Cir. 1980) and is reprinted in the Appendix herein at 1-16. The unreported order, findings of fact, and conclusions of law of the United States District Court for the Western District of Texas are reprinted in the Appendix herein at 17-23.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered May 29, 1980. The order denying rehearing was dated June 25, 1980. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254 (1) (1970).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. CONST., Amend. I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. §1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal***.

Clayton Act, 38 Stat. 731, 15 U.S.C. §15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §152(a):

> (a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. §18:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.***

STATEMENT OF THE CASE

In 1967 Community Cablevision Company ("Cablevision"), a partnership comprised of petitioner Midessa Television Co., Inc. and others[1], was formed and obtained a

[1] The partners included Midessa Television Company, Inc.; Doubleday Broadcasting Company, Inc.; Cablecom-General Inc.; Hodge Enterprises; and J. Howard Hodge, deceased.

franchise by city ordinance to operate a cable television system in Odessa, Texas. Cablevision carried, among others, the signals of the three area VHF network-affiliated stations, including those of two of its venturers. Respondent Midland Telecasting Company ("Midland") was a licensee for a UHF television station in Midland, Texas. Intermittently, from June 8, 1969 to March 16, 1971 and again from March 26, 1973 to October 15, 1974, Midland broadcast a signal and sporadically had its signal carried on a cable television system in Midland, Texas.[2]

According to its allegations and its deposition testimony, Midland orally requested Cablevision to carry its signal on the cable in Odessa, expecting Cablevision to bear the expense of employing microwave or other equipment to transport its signal from Midland, Texas to Odessa, Texas so that it could be received and carried. But Cablevision failed to do so. The Federal Communications Commission ("FCC") regulations in effect prior to 1972 apparently did not state the commission's view of whether the public interest required cable systems, upon an oral request by a broadcaster, to incur the expense of transporting a weak signal to the cable system. The regulations, however, did contain procedures for presenting such policy, legal, and factual issues for determination.[3]

From March 16, 1971, until March 26, 1973, Midland ceased broadcasting. After resuming broadcasting in 1973, Midland claims that it again requested that its signal be added to the Odessa cable. During this period, FCC regulations clearly prohibited the addition of television

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[2] The Midland, Texas cable system was owned by petitioner Tall City TV Cable Co.

[3] 47 C.F.R. § 74.1109 (1966) was virtually identical to 47 C.F.R. § 76.7 (1972), quoted in footnote 5, *infra*.

broadcast signals to cable systems without FCC approval.[4] The regulations also provided means for a broadcaster to initiate FCC proceedings to compel carriage of its signal.[5] Midland claims that in November 1973 it wrote to the FCC seeking relief, but it did not obtain any ruling that its signal be carried or further prosecute its petition. After Midland's signal became more powerful, so that large additional expense was not necessary, Cablevision secured FCC consent and added Midland's signal to its cable system on May 4, 1974, shortly before it was served with the complaint in this action. The signal was carried until October, 1974, during the pendency of this action, when Midland ceased broadcasting and ceased all business activity.

In this action against Cablevision, its partners, and two other defendants,[6] Midland asserts federal question jurisdiction under 28 U.S.C. §1331 and claims that defendants violated Section 1 of the Sherman Act by failing to carry its signal prior to May 4, 1974, and by failing previously to seek an administrative decision for the carriage of its signal. On motions by defendants filed following extensive

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[4] 47 C.F.R. § 76.11(a) (1972) provided in pertinent part:

> No cable television system shall . . . add a television broadcast signal to existing operations unless it receives a certificate of compliance from the [FCC] . . . .

[5] 47 C.F.R. § 76.7 (1972) provided:

> (a) On petition by a cable television system, a franchising authority, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

[6] Also named as defendants were Tall City TV Cable Co. and Communicable of Texas, Inc.

discovery, the district court dismissed the entire complaint on various grounds.[7] The trial court held that the FCC had exclusive jurisdiction to determine, under its public interest standard, whether a cable television system may fail to carry particular television broadcast communications and that it was inappropriate for a federal antitrust court to decide such issues. The district court concluded that Congress had authorized the FCC to regulate questions concerning whether, when and under what conditions signals are to be carried by cable television systems, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and that under the principles of *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975), such regulatory scheme displaces the antitrust laws as to that discrete and limited regulated matter. Further, on the basis of the pleadings, discovery and the full summary judgment record before it, the district court held as a matter of law, under the principles of *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), that Cablevision was justified in refraining from carrying Midland's signal until FCC approval had been obtained and, under the principles of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), that Cablevision's failure to petition the FCC for a decision could not be an antitrust violation. The trial court also concluded that Midland lacked standing because its alleged injury — resulting

[7] The grounds asserted in the motion were: (1) lack of jurisdiction under the antitrust laws because of exemptions or immunities therefrom; (2) lack of standing; (3) failure to state a claim upon which relief could be granted; (4) defendants were entitled to summary judgment or judgment on the pleadings as a matter of law; and (5) alternatively, as to events or transactions occurring during specific time periods, a failure to state a claim or a conclusively established defense of limitations.

from its signal not being carried on a television communications cable for a period of time — was not of the type against which the antitrust laws were intended to protect. It found that Midland was not claiming damages from the formation or franchising of Cablevision, and it granted defendants' motion for summary judgment as to the entire case, including Midland's claim under Section 7 of the Clayton Act.

A two-judge panel of the United States Court of Appeals for the Fifth Circuit reversed, focusing on FCC regulations and reports and reasoning that because the FCC had not issued substantive regulations, effective at the times of the failure to carry the signal and prohibiting the carriage of Midland's signal, there was no repugnancy between the FCC carriage rules and antitrust principles. The Court of Appeals, recognizing the requirement in the 1972 rules that a signal not be added to a cable system until the FCC issued a certificate of compliance, held that "there is no indication that this procedure was onerous or that the FCC would refuse certification." 617 F.2d, at 1149. It viewed the issue of the strength of Midland's signal to be a fact issue for the antitrust trial court and jury rather than one for administrative expertise. 617 F.2d, at 1144, n. 6. Further, despite the trial court's dismissal and judgment disposing of the entire case, the Court of Appeals held that the trial court had not considered the claim under Section 7 of the Clayton Act, 617 F.2d, at 1143-44, n. 4; and it did not consider the issue. Finally, although this Court's opinion in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) was discussed extensively in post-argument memoranda, the Court of Appeals did not advert to the first amendment implications of a claim that an antitrust violation occurred when a communications me-

dium failed to voluntarily carry particular communications to its viewers.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Court of Appeals decided important questions of federal law that have not been but should be settled by this Court.

Cable television is a relatively new and mushrooming communications medium whose impact on the lives of Americans is significant. This Court has never had an opportunity to determine the extent to which the Communications Act of 1934[8] and the first amendment affect the applicability, if any, of the Sherman Act[9] to a failure of a cable television system to carry a particular broadcaster's programming.

This Court has recently recognized that cable television systems are part of the press "media" protected in their editorial decisions by the first amendment. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). In the Communications Act of 1934, Congress granted the FCC broad power to regulate communications by wire and radio; and this Court has specifically held that such power includes the power to regulate a cable television system's carriage of television signals. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). The FCC has exercised such power and by regulations provided a comprehensive body of substantive and procedural rules for regulating, in the public interest, the selection of television communications to be carried by cable television systems. *See* 47 C.F.R. §74.1101 et seq. (1966); 47 C.F.R. §76.1 et seq. (1972). The rules specify

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[8] 48 Stat. 1064, as amended, 47 U.S.C. § 151, et seq.

[9] Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. §1, et seq.

general standards as to when carriage of particular signals is in the public interest and procedures for hearing and deciding disputes on such issues. The FCC has power to issue orders enforceable by contempt and subject to judicial review.

However, there was no such FCC ruling that is challenged in the instant case. Here, the plaintiff Midland did not prosecute a request to the FCC for resolution of any such issues, but instead, after it increased the power of its signal and as the defendant cable system with FCC approval began carriage of its signal, Midland brought an antitrust claim based on the non-carriage in the past. Although a cable system's carriage of broadcast television communications is not an economic transaction involving payment or receipt of consideration between the television broadcaster (which has released its signal into the airways) and the cable system (which receives the signal for its subscribers), the plaintiff broadcaster here contended that the failure to carry its signal was a "restraint of trade or commerce" within Section 1 of the Sherman Act. Until this case, no reported decision explored the applicability of the Sherman Act to such communications activities of cable television systems.

The application of the Sherman Act, read in light of the first amendment and as affected by the Communications Act, to a failure by a cable television system to carry programming of a particular broadcaster, is important to the orderly development of the burgeoning new communications medium of cable television, to the executive branch of the federal government in its performance of the responsibilities delegated by Congress in the Communications Act and in its enforcement of the antitrust laws, and to the judicial branch in defining its jurisdiction in this important area, as well as to parties having interests in private litigation such as the instant case.

The record is appropriate for deciding the broad and important legal issues involved, uncluttered with extraneous factual or evidentiary disputes or issues concerning the more technical elements of a substantive cause of action or defense under the Sherman Act. They are pure and broad issues of law, ripe for decision, and begging for final authoritative resolution by this Court.

B. The Court of Appeals, in reversing the trial court, decided the federal questions in a way in conflict with the applicable decisions of this Court.

1. *Effect of the Communications Act*

In *United States v. National Association of Securities Dealers,* 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975); *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 379 (1973); *Pan American World Airways v. United States,* 371 U.S. 296 (1963), this Court established the standards and principles for determining whether courts should infer a congressional intent in regulatory legislation to remove particular and discrete regulated activities from the regime of competition as fostered by the antitrust laws. Applying those principles to the legislative intent manifested in the Communications Act of 1934, as examined and related to cable television systems in *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968) and *United States v. Midwest Video Corp.,* 406 U.S. 649 (1972), the trial court concluded that the FCC had been granted exclusive jurisdiction to decide the legality of a cable system's failure to carry a television communication; and it accordingly dismissed the antitrust complaint and entered a summary judgment that the plaintiff broadcaster take nothing. The Court of Appeals reversed.

The Court of Appeals gave token recognition that congressional intent should determine the existence of an

implied antitrust exemption or immunity applicable to regulated activity. 617 F.2d, at 1146. However, it decided the case without reference to congressional intent either in 1934 when the Communications Act was enacted or in subsequent failures of Congress to enact modifying legislation. Rather, the Court of Appeals concentrated upon the actions of the FCC over the years in making the quasi-political determinations of the "public interest" as to cable system carriage of television signals. It quickly became diverted from the issue of whether it should infer that *Congress,* in 1934 and thereafter, had intended the FCC to be the single governmental agency, to the exclusion of antitrust courts, authorized to decide the propriety of a failure of a cable system to carry a television signal. The Court of Appeals neither cited nor discussed this Court's recent decisions concerning principles of exclusive jurisdiction or implied antitrust immunity nor did it analyze the nature or extent of the *power* conferred by *Congress* on the FCC to regulate cable systems. Rather, it became preoccupied with the issue that should have been presented to the FCC for resolution: whether the regulations declaring the "public interest" as might have been determined by the FCC, as of particular times, required that Midland's programming be carried on the cable in Odessa. It concluded its analysis as follows:

> In this case, CCC [Cablevision] had not demonstrated how FCC regulation interfered with the exercise of its business judgment with respect to the decision whether to carry Midland's signal. The regulations did not prohibit carriage of the signal, and, indeed may have required it. CCC's [Cablevision's] refusal was not therefore compelled by federal regulation. Accordingly, no repugnancy exists between the FCC carriage rules and antitrust principles.

617 F.2d, at 1141. The Court characterized its decision as a "holding that *FCC carriage rules did not operate to create an antitrust immunity* for CCC's refusal to carry Midland's signal," *Id.*, (emphasis added) citing the obvious, but inapplicable, principle mentioned in *United States v. Radio Corp. of America,* 358 U.S. 334 (1959) ("RCA") that the FCC was not created to decide antitrust issues as such and that its actions do not themselves prevent enforcement of the antitrust laws in federal courts.

Both the analysis and result of the Court of Appeals conflict with the applicable decisions of this Court. Since establishing in 1959 in *RCA* that the agency action itself is not the guidepost, this Court has subsequently made clear in several significant cases that it is the express and inferred *legislative intent* of Congress that determines whether the regulatory agency was granted exclusive jurisdiction over the particular activity in question. *United States v. National Association of Securities Dealers,* 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975); *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 379 (1973); *Pan American World Airways v. U.S.,* 371 U.S. 296, 304-05, 309-10 (1963).

Where there is no express provision on this point in the regulatory statute, the crucial legislative intent may be determined both from the purposes of the regulatory legislation, as evidenced by legislative history, and from the scope of the regulatory scheme as established by the legislation and its authoritative constructions.

This Court explored the legislative history of the Communications Act, particularly as it relates to regulation of cable television systems, in *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968). Quoting in part from the message to Congress from President Roosevelt, recom-

mending creation of the FCC, and from its prior decision relating to radio communications, this Court there concluded that

> the Commission was expected to serve as the "single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable or radio." It was for this purpose given "broad authority." . . . [T]he Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory scheme for the [broadcasting] industry." F.C.C. v. Pottsville Broadcasting Co. 309 U.S. 134, 137.

Id., at 168. Congress had acted to avoid a feared monopolistic domination in the new and far-reaching science of broadcasting. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Its regulatory scheme of granting and denying licenses and construction permits based on public convenience, interest, or necessity was deemed to be more appropriate to avoid that feared evil than the then existing regime of laws. *See Id.* The "public convenience, interest, or necessity" criterion apparently was the most concrete yet supple standard with which to guide the expert body in the executive branch charged by Congress with carrying out the broad legislative policy. *Id.*, at 138. In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court held that same legislative policy extended to regulation of carriage of television signals by cable systems.

In addition to the legislative history, the character and extent of the power conferred by the regulatory legislation is instructive in inferring whether Congress intended antitrust courts to have any concurrent jurisdiction with the regulatory agency. The test, as enunciated in *United States v. Philadelphia National Bank*, 371 U.S. 321, 352 (1963), is whether the regulatory scheme at issue

> is so comprehensive that the enforcement of the antitrust laws would either be unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure.

In making this determination, this Court has focused upon whether there is an irreconcilable conflict between the *regulatory power* delegated to an agency and the *judicial power* of an antitrust court over the activity in question such that regulated parties could be subjected to duplicative or inconsistent standards. *United States v. National Association of Securities Dealers,* 422 U.S. 694, 734-35 (1975). Petitioners assert that there is such an irremediable conflict here, in that the *power* granted the executive branch, on the one hand, to require or forbid carriage of a signal, and the asserted judicial power on the other, to impose treble damages for failure to carry a signal, are mutually repugnant. Under these circumstances the Court of Appeals, following this Court's applicable decisions, should have determined, as the trial court did, that the antitrust laws were displaced in this limited and discrete instance. *United States v. National Association of Securities Dealers,* 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975); *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 392, n. 14, (1973).

Contrary to the holding of the Fifth Circuit, enforcement of the antitrust laws in the instant case is inappropriate in view of both the completeness of the regulatory power and the disruption that conflicting antitrust judgments could render to the regulatory structure. *United States v. Philadelphia National Bank,* 371 U.S. 321, 352 (1963). The conduct charged as an antitrust violation here involves the precise subject matter of the regulatory power vested in the FCC. *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968). *See Gordon v. New York Stock*

Exchange, 422 U.S. 659, 683-84 (1975); *Pan American World Airways v. United States,* 371 U.S. 296, 305 (1963). The FCC pervasively regulates the carriage of television signals on cable systems, and closely monitors ongoing developments in cable communications. *United States v. Midwest Video Corp.,* 406 U.S. 649 (1972).

In *Southwestern Cable,* this Court emphasized that pervasive FCC regulation of cable systems is vital to the achievement of the purposes intended by Congress, noting that:

> The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated for broadcasting is demonstrably a principal source of information and entertainment for a great part of the nation's population. The Commission has reasonably found that the successful performance of these duties demand prompt and efficatious regulation of community antenna television systems. We have elsewhere held that we may not 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'

392 U.S. 157, at 177 (1968) (citations omitted). Judge (now Chief Justice) Burger, writing for the D.C. Circuit Court of Appeals, after analyzing the statutes and the FCC regulations applicable to cable systems, reached a similar conclusion as to the pervasiveness of the regulatory power of the FCC over cable television systems:

> As we view the record now before us and consider it in light of our own holdings and the holdings of the Supreme Court, it seems clear that as the outlines of

> the CATV problems emerge, the Commission acted within the scope of the Act and consistent with the broad purposes of the Act by treating its responsibilities as *comprehensive and pervasive.* Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority.

General Telephone of California v. FCC, 413 F.2d 390 (D.C. Cir. 1969) (emphasis added), *cert. denied,* 396 U.S. 888 (1969).

Like the regulatory agencies involved in *United States v. National Association of Securities Dealers,* 422 U.S. 694 (1975) (Securities and Exchange Commission) and *Pan American World Airways v. United States,* 371 U.S. 296 (1963) (Federal Aviation Administration), the FCC was granted by Congress the uncontested power to consider the legal, factual, and policy issues and determine whether it was in the public interest to authorize or require the addition of a broadcaster's signal to the array of programming on a cable system, as well as the power to issue orders necessary to the execution of its function. *See United States v. Southwestern Cable Co.,* 392 U.S. 157, 178-79, 180 (1968). In the instant case, Midland could have presented its dispute to the FCC and sought a decision pursuant to the applicable standards of the public interest, convenience, or necessity but it chose not to do so. Intrusion by an antitrust court into this area would be unwarranted, duplicative and contrary to congressional intent.

This Court consistently has found justification for implied antitrust immunity to be stronger when the agency may consider in its decision-making the effects of competition. *See Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975); *United States v. National Association of Se-*

curities Dealers, 422 U.S. 694 (1975); *Pan American World Airways v. United States*, 371 U.S. 296 (1963). Particularly in *National Association of Securities Dealers, supra*, this Court found persuasive the fact that the SEC had power to weigh competitive concerns in the exercise of its supervisory responsibility. 422 U.S., at 732. Here, the FCC specifically is required to take competition into consideration in making the assessment of the public interest relating to cable television operations.[10]

In the instant case as in that case, the regulatory aims determined by Congress could be thwarted by inconsistent standards prescribed contemporaneously by antitrust courts and the FCC. *Cf. Gordon v. New York Stock Exchange*, 498 F.2d 1303, 1306 (2d Cir. 1974), *aff'd*, 422 U.S. 659 (1975). The congressional issuance of the broad and pervasive mandate for the FCC to regulate in the public interest whether and when cable television systems will carry broadcast communications is repugnant to a notion that such carriage decisions should result from unbridled free competition.

Congress intended to rely upon the FCC's expertise in the field of cable television. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). This Court has opined that

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[10] This Court noted in United States v. Southwestern Cable Co., 392 U.S. 157, 175 n. 43-44 that as early as 1959, Congress was concerned with the competitive effects cable television had on the orderly development of television and that such concern led to the promulgation of signal carriage restrictions. See First Report and Order, 38 FCC 683 (1965); Second Report and Order, 2 FCC2d 725 (1966). In its First Report and Order respecting cable television, the Commission found that cable television creates "substantial competition" for local broadcasting and that "the likelihood or probability of [cable television's] adverse impact upon potential and existing services has become too substantial to be dismissed." 38 FCC 683, 707, 713-14 (1965).

the existence of such reliance upon agency expertise suggests a finding of implied antitrust immunity. *Gordon v. New York Stock Exchange,* 422 U.S. 659, 689-90 (1975). Antitrust courts are without the expertise of the FCC to evaluate the dynamic and technical aspects of cable television (including the varying effective power of broadcast signals which the Court of Appeals here thought should be "fact issues" in an antitrust trial), or to render comprehensive "public interest" policy judgments for the orderly development of a national network of television communications. If the congressional intent is to be implemented, the FCC must be permitted to regulate, comprehensively and without interference, questions concerning whether, when, and under what conditions broadcast television communications are to be carried on cable television systems. *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968).

It seems apparent that the FCC cannot effectively implement congressional intent to establish a coordinated national communications policy if its decisions whether communications should be carried on a cable system are subject to contradictory judgments of antitrust courts. As this Court reasoned in *Pan American World Airways v. United States,* 371 U.S. 296, 310 (1963):

> if the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide.

371 U.S., at 310.

The opinion of the Fifth Circuit will foster such a collision of the two regimes. The resolution of this question of first impression will prevent such a collision of antagonistic jurisdictions, and thereby will promote the public interest.

2. *Effect of the First Amendment*

There are other significant reasons why the antitrust laws do not apply to a failure, for a time, by a cable television system to carry a broadcaster's signal. First, as pointed out in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709, n. 19 (1979), there are significant constitutional implications of any ruling that a cable television system (a part of the "media") is or was required to carry program material over which it had no editorial discretion or control. In that case, however, this Court found in the Communications Act itself sufficient statutory indications of congressional intent to safeguard the journalistic freedom and editorial discretion of cable television systems and to invalidate the FCC's public access rules. That same congressional intent like its parallel constitutional inspiration in the first amendment is further instructive upon whether the antitrust laws apply to a failure of a cable system to carry a particular signal or its failure to seek necessary administrative consent for such carriage. It is well established that the Sherman Act must be construed and interpreted in ways that will preclude its infringement upon constitutional rights. *E.g. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). Here, the plaintiff's complaint is that the defendants violated the Sherman Act by failing to carry a signal whose editorial content was controlled exclusively by the plaintiff itself. However, the Court of Appeals did not even mention or consider the constitutional implications of its ruling.

The defendants contend that, as a matter of law, their failure to seek from the FCC an administrative decision on the question of carriage could not be an antitrust violation. Just as a concerted attempt to influence legislative or executive governmental action is constitutionally protected from antitrust scrutiny, *Eastern Railroad Pres-*

idents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), they contend that their failure to seek action by the FCC could not be a violation of the Sherman Act. The Court of Appeals merely held in a footnote, that a failure or refusal to attempt to influence the FCC does not enjoy the same constitutional protection as an attempt to influence it.

The case should at least be remanded for consideration of the constitutional issues.

3. *Application of Antitrust Principles*

The Court of Appeals failed fully to consider the bases of the district court's dismissal of the complaint and erroneously stated that the challenged inactivity of Cablevision could state an antitrust claim as a group boycott or the denial of access to essential services. Petitioners respectfully urge that Respondent failed to state a claim under any potential theory of antitrust liability.

Contrary to the suggestion of the Court of Appeals, the failure of Cablevision to carry Midland's television communications cannot, as a matter of law, constitute a "group boycott." The term "group boycott" connotes "a refusal to deal or an inducement of others not to deal or to have business relations with tradesmen." Von Kalinowski, *The Per Se Doctrine — An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. Rev. 569, 580, n.49 (1964). In the instant case, there was no refusal or inducement of others to refuse to trade or enter into any business transactions. Rather, Midland merely alleged that Cablevision failed to carry to its subscribers Midland's broadcast signal that was free for the taking by the public. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161-62 (1968). Such inactivity simply does not constitute a "group boycott."

The Court of Appeals further opined that the failure to carry Midland's signal might constitute a "denial of access to essential services." Neither the decision cited by the Court of Appeals, *United States v. Terminal R.R. Ass'n.*, 224 U.S. 383 (1912), nor any other authority of which petitioners are aware, supports or even suggests such a theory of antitrust law. Indeed, a holding that Cablevision was required to carry Midland's signal would, in effect, contrary to congressional intent, render it a "common carrier." *Cf. FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

Particularly in light of the Communications Act and the first amendment, the antitrust laws are not intended to protect television broadcasters from failure of cable systems to carry their signals. When it alleged injury from such a failure, Midland did not allege injury resulting from "anything forbidden in the antitrust laws", 15 U.S.C. §15, and thus, it lacked standing. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Similarly, since Congress created the FCC to stand between broadcasters and cable systems as the regulator of cable carriage of broadcast signals, a broadcaster lacks standing under the antitrust laws to complain of a failure to carry its signal. *See Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975).

Thus, the Court of Appeals has erroneously decided questions of the applicability of the Sherman Act to the inactivity of which petitioners are accused; and its ruling is in conflict with applicable decisions of this Court.

C. The Court of Appeals, in denying that the trial court ruled on the Section 7 claim, so departed from the accepted and usual course of judicial proceedings as to require exercise of this Court's power of supervision.

The trial court granted a summary judgment of dismissal of the entire case. In the findings of fact and conclu-

sions of law the district court found that Midland did not claim any antitrust injury by reason of the conception or creation of Cablevision or by reason of its seeking or securing a franchise to operate in Odessa. This is patently obvious since Midland's complaint was not of the existence and operation of the cable system; its complaint was of the delay of the cable in carrying its signal. It had admitted this to the trial court. Nevertheless, despite this finding and admission and the dismissal of the entire case, the Court of Appeals stated in a footnote, that the district court had not ruled on the applicability of Section 7 of the Clayton Act to the facts.

The opinion in this regard is blatantly incorrect. By so misstating the obvious and express facts and lower court holding, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. At least a writ of certiorari should be issued and the case remanded to the Court of Appeals for consideration of the Section 7 aspects of the trial court's dismissal of the entire case.

CONCLUSION

Petitioners respectfully urge the Court to grant a writ of certiorari, to reverse the decision below, and to remand the case to the United States Court of Appeals for the Fifth Circuit with appropriate instructions.

Respectfully submitted,

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APPENDIX

MIDLAND TELECASTING COMPANY,

Plaintiff-Appellant,

v.

MIDESSA TELEVISION COMPANY, INC., et al.,

Defendants-Appellees.

No. 78-2515.

United States Court of Appeals,
Fifth Circuit.

May 29, 1980.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE,* AINSWORTH and SAM D. JOHNSON, Circuit Judges.

AINSWORTH, Circuit Judge:

This is an antitrust suit brought by a UHF television station against a cable television company and its co-owners alleging that its refusal to carry plaintiff's UHF signal on its cable violated the antitrust laws.[1] The district court granted defendants' motion for summary judgment primarily on the ground that federal regulation of cable television created an implied immunity from the effect of the antitrust laws. We reverse.

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* Judge Tuttle did not participate in either the consideration or determination of this case.

[1] Suit was also brought against two companies involved in the operation of broadcasting in nearby communities but who were not co-owners of the cable company.

Plaintiff Midland Telecasting Company (Midland) operated a UHF television station from Midland, Texas. It broadcast on Channel 18 from June 8, 1969 to March 16, 1971 and from March 26, 1973 to October 15, 1974.

In 1967, defendant Community Cablevision Company (CCC) was created for the purpose of operating a community antennae television (CATV) system in nearby Odessa, Texas. CCC was a joint venture by defendants Midessa Television Company (Midessa), Doubleday Broadcasting Company (Doubleday), Hodge Enterprises, J. Howard Hodge, and Cablecom-General, Inc. Both Midessa and Doubleday were direct competitors with Midland. Midessa operated a VHF station, affiliated with NBC, located between Midland and Odessa. Doubleday operated another network-affiliated VHF station located in Odessa. In 1968, CCC was granted an exclusive franchise by the City of Odessa to operate a CATV or cable system in Odessa. CCC carried the signals of the three VHF stations serving the Midland-Odessa area including the signals of the two VHF stations owned by joint venturers Midessa and Doubleday.[2] By the end of 1971, a significant portion of the homes in Odessa subscribed to CCC's cable system.

In its complaint,[3] Midland alleged that from 1969 until the filing if this suit in 1974, CCC refused to carry Midland's signal on its cable despite repeated requests to do so, and that the refusal was designed to eliminate Midland

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[2] Besides the stations owned by defendants Midessa and Doubleday, CCC carried the third VHF station operating in the Midland-Odessa area. That station was not involved in the CCC joint venture.

[3] The allegations are set forth in Midland's Third Amended Complaint filed August 9, 1976 (R. 647). Midland moved for leave to file a Fourth Amended Complaint. After hearing oral argument,

from the Midland-Odessa television broadcasting market. As a result, it is averred that Midland could not become a "commercially viable enterprise" or obtain network affiliation, and was forced to halt broadcasting from March 1971 until March 1973 and later from October 1974 until the present time. Thus, Midland alleged that from 1969 until 1974, the defendants engaged in a continuing combination and conspiracy to restrain competition in the television broadcasting industry in the Midland-Odessa market in violation of section 1 of the Sherman Act, 15 U.S.C. § 1.[4] Midland sought treble damages pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, as well as injunctive relief and attorney's fees.

The district court granted defendant Midessa's motion to dismiss and for summary judgment on the basis of findings of fact and conclusions of law prepared by counsel for Midessa.[5] While the district court relied on a number of grounds, it primarily found that (1) Midland lacked stand-

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the district court did not rule on the motion prior to entering its order dismissing the action.

[4] Midland also claimed that the formation of CCC by Midland's competitors constituted a violation of section 7 of the Clayton Act, 15 U.S.C. § 18. The district court did not rule on the applicability of section 7 to the facts alleged in this suit, and accordingly this issue is not presented on appeal. Midland's Fourth Amended Complaint raised claims based on section 2 of the Sherman Act, 15 U.S.C. § 2. Since the district court did not rule whether Midland could file its amended complaint, the section 2 claim is also not raised on appeal.

[5] A district court's acceptance of the findings of fact and conclusions of law prepared by the prevailing party to a suit, while not prohibited, should be discouraged since it leaves the reviewing court with doubt concerning the actual basis of the trial judge's decision. See *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 257-258 (5th Cir. 1980).

ing to assert the claim, and (2) defendants were immune from antitrust scrutiny by virtue of federal regulation over cable television.[6] We discuss these points in order.

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[6] Three other issues raised by the district court's decision do not require extended discussion.

First, appellees argue that CCC's refusal to carry Midland's signal is protected by the *Noerr-Pennington* doctrine because CCC would have had to obtain FCC approval in order to carry the signal. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). The basis of the doctrine is the "need to protect efforts directed to government officials for the purpose of seeking redress." *Mid-Texas Communications Systems, Inc. v. AT&T*, 615 F.2d 1372, 1382 (5th Cir. 1980). Here, appellees do not claim that they did anything designed to influence the FCC directly, but rather that they are entitled to *Noerr-Pennington* protection for failing or refusing to bring an administrative proceeding. As such, there was no effort to influence governmental action within the meaning of the doctrine. *Cf. Mid-Texas Communications*, 615 F.2d at 1384.

Appellees also argue that the district court's decision should be affirmed because there was no issue of material fact. In similar circumstances, the Supreme Court has stated that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" *Poller v. CBS*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). *See Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 89 S.Ct. 1391, 22 L.Ed.2d 658 (1969); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 486 (5th Cir. 1967). Here, contrary to the district court's resolution, it is clear that there exist several issues of material fact. Foremost is the motive and intent of the appellees in refusing Midland's requests to have its signal carried. The fact that Midland does not have any direct evidence of im-

1. STANDING

Standing for damage actions under the antitrust laws is controlled by section 4 of the Clayton Act which grants standing to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." 15 U.S.C. § 15. *See* 2 P. Areeda & D. Turner, Antitrust Law § 334a (1978). The allegations in this case are clearly sufficient to afford Midland standing. Midland alleged injury in fact to its business in that it lost advertising revenues and was forced to stop broadcasting because of CCC's refusal to carry its signal. Antitrust liability is based upon the theory that defendants either took part in a group boycott, *see Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), or acted in concert to refuse access to an essential facility,

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proper motive is not determinative as the Supreme Court made clear in *Poller*. Appellees' asserted defense that Midland's signal was too weak to be carried, while it may present an adequate defense at trial, *cf. E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178 (5th Cir. 1972), must be proven first and the quality of Midland's signal is disputed. Accordingly, summary judgment was not warranted since issues of material fact existed which should be resolved by a jury.

Finally, appellees contend that Midland cannot collect any damages for the period from March 16, 1971 to March 26, 1973 since Midland was not then broadcasting a signal. But if appellees' alleged illegal conduct was the proximate cause of Midland's inability to broadcast, appellant is entitled to recover lost profits even though it was not broadcasting. *See Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 23-24 (5th Cir. 1974). *See generally* Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv.L.Rev. 1566 (1967). The question whether appellees' actions were responsible for Midland's failure to broadcast, and if so, what damages, if any, were sustained, are issues of fact to be resolved by the jury.

see United States. v. Terminal Railroad Association, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912). As such, the alleged injury is the type which if proven the antitrust laws seek to prevent. Finally, the injury is alleged to be the direct result of defendants' unlawful conduct.

The district court's reliance on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) and *Jeffrey v. Southwestern Bell,* 518 F 2d 1129 (5th Cir. 1975) on the issue of standing is misplaced. In *Brunswick,* operators of bowling alleys sought damages for profits allegedly lost when defendant unlawfully acquired certain unprosperous alleys and operated them itself instead of permitting them to fail. The Supreme Court denied recovery since plaintiffs had failed to demonstrate "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick,* 429 U.S. at 489, 97 S.Ct. at 697. It is clear that in the present case the injury alleged flows directly from defendants' group boycott or refusal to deal. In *Jeffrey,* residential telephone subscribers challenged Bell's equipment policies of buying only from its wholly-owned subsidiary. This court held that Bell's retail customers were not the "target" of the alleged monopolistic practices and therefore did not have standing since they could not "adequately vindicate the purposes of the antitrust laws." *Jeffrey,* 518 F.2d at 1131. The court stated that antitrust standing should be granted to that "sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Id.* Midland, under the allegations in its complaint, was the target of the conspiracy and as such is an adequate representative of that sector of the economy which is threatened by the alleged anticompetitive acts of the defendants. As such, Midland has standing under section 4.

2. IMPLIED IMMUNITY

It is undisputed that the Federal Communications Act of 1934 (the Act), 47 U.S.C. § 151 *et seq.*, does not explicitly provide an exemption from the antitrust laws for a cable television company's decision as to which signals it will carry.[7] The district court, however, held that the existence of Federal Communication Commission's (FCC) regulation concerning carriage of signals by cable systems created an implied immunity from the antitrust laws for CCC's refusal to carry Midland's signal.

The Supreme Court has held that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 1734-35, 10 L.Ed.2d 915 (1963) (footnotes omitted). *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595-98, 96 S.Ct. 3110, 3120, 49 L.Ed. 2d. 1141 (1976). Judicial unwillingness to imply an immunity reflects the importance of antitrust principles in the structure of the American economy. By enacting the antitrust laws, Congress intended to "establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398, 98 S.Ct. 1123, 1129, 55 L.Ed.2d 364 (1978) (footnote omitted). *See Carnation Co. v. Pacific*

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[7] The Communications Act provides explicit exemptions from the antitrust laws only for telephone company consolidations and acquisitions. 47 U.S.C. §§ 221(a), 222(c)(1). The existence of an explicit exemption covering certain acts is evidence that Congress did not intend to grant immunity to other acts not covered by the explicit exemptions. *See, e.g., California v. FPC*, 369 U.S. 482, 485, 82 S.Ct. 901, 904, 8 L.Ed.2d 54 (1962); *Cain v. Air Cargo, Inc.*, 599 F.2d 316, 320 (9th Cir. 1979).

Westbound Conference, 383 U.S. 213, 218, 86 S.Ct. 781, 784, 15 L.Ed.2d 709 (1966). Accordingly, antitrust immunity will be implied only if necessary to permit the regulatory scheme to function, and then only to the "minimum extent necessary." *Silver v. New York Stock Exchange,* 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963). *See Mid-Texas Communications Systems, Inc. v. AT&T,* 615 F.2d 1372, 1379 (5th Cir. 1980).

The starting point for determining the existence of an implied immunity is the intent of Congress. *United States v. Borden Co.,* 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939). The Act does not explicitly provide for FCC authority to regulate cable television since in 1934 when it was passed Congress did not anticipate the development of cable technology. With the advent of the cable systems during the 1950s, the FCC studied possible regulatory responses to the potential conflict between cable and television broadcasting. In 1959, the FCC concluded that since cable operators were neither common carriers nor broadcasters within the meaning of the Act, it has no authority to regulate them. *CATV and TV Repeater Services,* 26 F.C.C. 403 (1959). After an unsuccessful attempt to obtain clarifying legislation from Congress, the FCC reversed its position and asserted jurisdiction over cable broadcasting. *Carter Mountain Transmission Corp.,* 32 F.C.C. 459 (1962), *aff'd,* 321 F.2d 359 (D.C.Cir. 1962), *cert. denied,* 375 U.S. 951, 84 S.Ct. 442, 11 L.Ed.2d 312 (1963). In 1966, the FCC issued a comprehensive order setting forth regulations for the industry. *Second Report and Order,* 2 F.C.C.2d 725 (1966). *See generally* Smith, *Primer on the Regulatory Development of CATV* (1950-72), 18 Howard L.J. 729 (1975). *See also* D. LeDuc, *Cable Television and the FCC: A Crisis in Media Control* (1973).

The Supreme Court upheld the FCC's general authority to regulate cable television in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968). Despite the lack of explicit authorization, the Court based its decision on the fact that Congress had granted the FCC broad authority over "all interstate and foreign communication by wire or radio . . ." 47 U.S.C. §152(a). *Southwestern Cable, supra,* 392 U.S. at 167-68, 88 S.Ct. at 2000. *See United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972). The FCC's power over cable television, however, is not unlimited. The FCC can regulate cable television only where its regulations are "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting." *Southwestern Cable,* 392 U.S. at 178, 88 S.Ct. at 2005. *See Brookhaven Cable TV, Inc. v. Kelly,* 573 F.2d 765, 767 (2d Cir. 1978) (FCC may regulate cable systems if it furthers a "goal which [the FCC] is entitled to pursue in the broadcast area"), *cert. denied,* 441 U.S. 904, 99 S.Ct. 1991, 60 L.Ed.2d 372 (1979). Thus, the Supreme Court recently rejected an effort by the FCC to compel cable systems to provide common carriage of public-originated transmissions because doing so would convert cable broadcasters into common carriers which is inconsistent with FCC authority over broadcasting. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979). *See Home Box Office v. FCC,* 567 F.2d 9 (DC.Cir. 1977), *cert. denied,* 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977). *See generally Comment, FCC Authority Over Cable Television,* 1979 Wisc.L.Rev. 962.

An examination of FCC regulation concerning carriage access rules for cable systems in effect during the period 1969-1974 shows that CCC was not prevented from carrying Midland's signal by reason of regulatory constraints.

Until 1972, carriage access requirements were covered by the FCC's *Second Report and Order,* 2 F.C.C.2d 725 (1966) [*1966 Rules*]. Cable companies were required to carry the signals of any local broadcast station. *1966 Rules* 2 F.C.C.2d at 752-53. They were not permitted to import distant signals into the nation's 100 largest television markets. *1966 Rules,* 2 F.C.C.2d at 782. The FCC also provided for certain restrictions to minimize duplication of programming. *1966 Rules,* 2 F.C.C.2d at 747. None of the restrictions established by the 1966 Rules was applicable to Midland's signal. Accordingly, while it is not clear whether Midland was a local broadcaster in the Odessa community so that its signal would have been required to be carried, it is certain that the 1966 Rules did not prohibit CCC's carriage of Midland's signal. Moreover, under the 1966 Rules, there was no requirement that a cable system obtain FCC approval prior to carrying a station's signal. The cable company simply had to notify the station and the FCC of its action. *1966 Rules,* 2 F.C.C.2d at 803-04 (§ 74.1105).

The carriage rules were amended in 1972. *Cable Television Report and Order,* 36 F.C.C.2d 141 (1972) [*1972 Rules*]. The FCC divided television markets by size and promulgated rules for each type market. Since the Midland-Odessa market was not one of the top 100 television markets, the "smaller television market" rules were applicable to CCC. *1972 Rules,* 36 F.C.C.2d at 214 (§ 76.5(i)). As a general matter, the FCC carriage provisions were designed to assure that all "local" stations were carried on a cable system. *1972 Rules,* 36 F.C.C.2d at 173. "Local" was defined to include signals of stations within 35 miles of the cable system. The 35-mile provision was especially designed to aid in the development of UHF stations. As the FCC stated in its report:

> All cable systems must carry, on request, the signals of all stations licensed to communities within 35 miles of the

> cable system's community. This requirement, based on policy considerations similar to those underlying existing carriage rules, is intended to aid stations — generally UHF — whose Grade B contours are limited. In this manner less powerful stations will be able to compete with more powerful stations in the same market more effectively than they could under our old carriage rules; they will be capable of extending their coverage into the area that we have determined is generally necessary for the development of broadcasting stations.

1972 Rules, 36 F.C.C.2d at 174 (footnote omitted). The 1972 Rules also changed the notification requirement relating to a cable system adding a signal. Specifically, the new rule provided that "[n]o cable television system shall commence operations unless it receives a certificate of compliance from the Commission." *1972 Rules,* 36 F.C.C.2d at 217 (§ 76.11(a)). As with the 1966 Rules, nothing in the FCC regulations prohibit carriage of Midland's signal.[8]

A cable broadcaster's selection of signals to be carried on its cable is significant. The array of stations offered to

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[8] The rules promulgated by the FCC for smaller television markets are as follows:

> § 76.59 *Provisions for smaller television markets.*
>
> A cable television system operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:
>
> (a) Any such cable television system may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:
>
> (1) Television broadcast stations within whose specified zone the community of the system is located, in whole or in part;

potential subscribers is one of the primary selling points of the cable system. Accordingly, the cable company's decision on which stations to carry is an important exercise of its business judgment. Ordinarily, the cable company might base its decision on a variety of business reasons including the station's broadcast offerings or the projected viewing preferences of the cable's subscribers. As the Supreme Court has recognized, the mere fact that a business decision is subject to a degree of regulatory control does not automatically result in an antitrust immunity. *Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). In this case, CCC has not demonstrated how FCC regulation interfered with the exercise of its business judgment with respect to the decision whether to carry Midland's signal. The regulations did not prohibit carriage of

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(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

(3) Commercial television broadcast stations licensed to communities in other smaller television markets within whose Grade B contours the community of the system is located, in whole or in part;

(4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vermont-Plattsburgh, New York television market);

(5) Television translator stations, with 100 watts or higher power, licensed to the community of the system;

(6) Commercial television broadcast stations that are significantly viewed in the community of the system. See § 76.54.

36 F.C.C.2d at 230-31. Under these rules, CCC may have been required to carry Midland's signal. Resolution of this point depends on certain factual questions which are best resolved on remand.

the signal, and, indeed, may have required it. CCC's refusal was not therefore compelled by federal regulation. Accordingly, no repugnancy exists between the FCC carriage rules and antitrust principles. If the refusal violated antitrust laws, a finding of liability would not undermine or conflict with the regulatory scheme. Given the FCC's policy to promote UHF broadcasting, the regulatory and antitrust principles are, in fact, complementary.

In holding that FCC carriage rules did not operate to create an antitrust immunity for CCC's refusal to carry Midland's signal, we are guided by the Supreme Court's decision in *United States v. RCA*, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959). In *RCA*, the United States brought suit alleging that RCA violated the antitrust laws by coercing another company to exchange television stations with it. RCA defended on the ground that the exchange had been considered and approved by the FCC. The Court held that neither the general provisions of the Communications Act nor the specific actions of the FCC served to create an antitrust immunity for the acts complained of by the government. "Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts." *RCA, supra*, 358 U.S. at 346, 79 S.Ct. at 464. Indeed, numerous courts have refused to imply antitrust immunity in a number of factual circumstances involving federal regulation over the communications industry. *See, e. g., Mid-Texas Communications, supra* 615 F.2d at 1377; *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114, 1116-24 (3d Cir. 1979); *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 934 (9th Cir. 1975); *Jarvis, Inc. v. AT&T*, 481 F.Supp. 120, 123 (D.D.C.1978); *MCI Communications Corp. v. AT&T*, 462 F.Supp. 1072, 1089-96

(N.D.Ill.1978); *United States v. AT&T*, 461 F.Supp. 1314, 1320-30 (D.D.C. 1978).[9]

Appellees argue that before Midland's signal could be added to the cable it was necessary for CCC to file a statement with the FCC, and that this filing procedure acted to create an antitrust immunity. The argument is without merit. Under the 1966 Rules, CCC only had to notify the station and the FCC of its intention to add the signal. While the 1972 Rules required the FCC to issue a certificate of compliance prior to CCC being able to add the signal, there is no indication that this procedure was onerous or that the FCC would refuse certification.[10] In essence, the certifica-

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[9] Appellees seek to distinguish *RCA* on the ground that in that case the Supreme Court was considering antitrust immunity within the confines of the FCC's regulatory authority under Title III of the Communications Act concerning regulation of broadcasting whereas FCC authority over cable televisions arises from Title I of the Act. This argument is incorrect. First, the Supreme Court decisions in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968), and *FCC v. Midwest Video Corp.*, 440 U.S 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979), hold that while the FCC general authority over cable broadcasting arises from Title I, its specific authority is exercised in conjunction with its authority over broadcasting under Title III. As such, the *RCA* decision is directly relevant. Moreover, appellees have failed to demonstrate the significance of a holding that FCC authority arises under Title I. Cases concerning Title II and the FCC's regulation over common carriers have also refused to find antitrust immunities. See, e. g., *Mid-Texas Communications Systems, Inc. v. AT&T*, 615 F.2d 1372 (5th Cir. 1980); *MCI Communications Corp. v AT&T*, 462 F.Supp. 1072, 1978-1084 (N.D.Ill.1978). Accordingly, since the issue is not relevant to our ultimate determinations, we need not resolve whether the question of antitrust immunity must be considered within the confines of Title I or Title III.

[10] The FCC description of the procedure indicates the pro forma nature of the certificate requirement:

tion requirement was analogous to a licensing requirement. The *RCA* decision makes clear that the FCC's licensing power does not, in and of itself, confer antitrust immunity. *RCA, supra,* 358 U.S. at 348-52, 79 S.Ct. at 466-68.

Appellees also argue that they should not be subject to antitrust liability given the fact that Midland could have brought an action before the FCC to compel carriage. This contention is also without merit. There is no requirement that an antitrust plaintiff exhaust administrative remedies as a prerequisite to bringing an antitrust suit. *Mid-Texas Communications, supra,* 615 F.2d 1380 (plaintiff permitted to prosecute antitrust action for wrongful failure of telephone company to interconnect its long-distance facilities despite existence of procedure under Communications Act

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Absent special situations or showings, requests consistent with our rules will receive prompt certification. The rules will operate on a "go, no-go" basis – i. e., the carriage rules reflect our determination of what is, at this time, in the public interest with respect to cable carriage of local and distant signals. We will, of course, consider objections to signal carriage applications and have retained special relief rules, but those seeking signal carriage restrictions on otherwise permitted signals have a substantial burden. Before restrictions are imposed in such cases, there will have to be a clear showing that the proposed service is not consistent with the orderly integration of cable television service into the national communications structure and that the results would be inimical to the public interest. We have during the course of this proceeding fully considered the question of impact on local television service and we do not expect to re-evaluate that general question in individual cases. And, for the same reason, we have no intention of re-evaluating on request of cable systems in individual proceedings the general question settled in our carriage and exclusivity rules Rather, we strongly believe that cable systems must generally operate under these rules and that, only after meaningful experience, will we be in position for a general reassessment. 2 F.C.C.2d at 186-87.

whereby plaintiff could have compelled interconnection). *See RCA, supra,* 358 U.S. at 352, 79 S.Ct. at 468; *Carnation, supra,* 383 U.S. at 224, 86 S.Ct. at 787-88.

In light of the fact that FCC regulation of carriage access for cable broadcasting did not conflict with antitrust principles in the context of CCC's decision to carry Midland's signal, there is no justification for holding that appellees have antitrust immunity. Accordingly, the judgment must be reversed and the case remanded for trial.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MIDLAND TELECASTING COMPANY

v.

MIDESSA TELEVISION COMPANY, INC., et al.

No. MO-74-CA-47

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the motion by defendant Midessa Television Company, Inc. to dismiss and for judgment, the briefs in support and in opposition thereto, the pleadings, depositions, affidavits, other documents on file, and the argument of counsel, the court now makes the following findings of fact and conclusions of law:

Findings of Fact

From the plaintiff's complaint, briefs and argument, it appears undisputed and the Court finds as follows:

(a) Community Cablevision Company is a joint venture, comprised of other defendants herein, formed in 1967 to construct and operate a CATV system in Odessa, Texas;

(b) Such joint venture received a franchise from the City of Odessa, Texas, by city ordinance, to operate such CATV system;

(c) Since 1968 such joint venture has operated such CATV system;

(d) During the relevant period the Federal Communications Commission has regulated CATV systems as to questions of carriage of television signals;

(e) The plaintiff was an independent (not affiliated with a major TV network) licensee for the operation of a UHF television station in the city of Midland, Texas:

(f) The plaintiff operated its station from June, 1969, until March, 1971, and thereafter from March 26, 1973, until October 15, 1974;

(g) Previously, on May 4, 1974, before any defendants were served with process in this case, Community Cablevision Company began carrying the signal of the plaintiff, pursuant to permission and authority therefor by the Federal Communications Commission.

(h) The plaintiff does not assert or claim any antitrust injury by reason of the conception or creation of Community Cablevision Company or of its efforts to induce the city counsel of Odessa to grant it a franchise, or of the actual granting of such franchise of such city;

(i) Administrative approval of the Federal Communications Commission was necessary before the signal of the plaintiff could be legally carried on the CATV system of Community Cablevision Company;

(j) Federal Communications Commission regulations did not preclude the plaintiff from seeking and receiving an FCC ruling on any request it may have had for carriage on the CATV system of Community Cablevision Company.

(k) The plaintiff's claim is that the Sherman Act was violated by alleged refusals of the defendants to apply to the FCC for approval of carriage of plaintiff's signal on the CATV system of Community Cablevision Com-

pany prior to the actual granting of such approval in 1974.

CONCLUSIONS OF LAW

1. The Federal Communications Commission was granted by Congress in the Communications Act statutory jurisdiction to regulate the question of carriage of signals by CATV systems.

United States v. Southwestern Cable Company, 392 U.S. 157, 20 L.Ed.2d 1001 (1968). In exercising such jurisdiction it may issue rules and regulations and prescribe such conditions not inconsistent with law as public convenience, interest or necessity require. *United States v. Midwest Video Corp.* 406 U.S. 649, 32 L.Ed.2d 390 (1972).

2. Congress has vested in the Federal Communications Commission final authority to determine whether, when, and under what conditions the signals of television stations may or shall be carried upon CATV systems. The regulatory scheme mandated by Congress is pervasive, at least insofar as it applies to the question of carriage raised in the instant case. There can be no reconciliation of the FCC's authority to determine such questions of carriage with any Sherman Act declaration (as may be asserted by the plaintiff) that a refusal to apply for FCC permission or a refusal of carriage is or can be illegal. The antitrust laws must give way, at least in this narrow and discrete area of carriage of signals on CATV systems, if the regulatory scheme established by the Communications Act is to work. Thus, the plaintiff's complaint under the Sherman Act must be dismissed. *U.S. v. National Association of Security Dealers,* 422 U.S. 694, 45 L.Ed.2d 486(1975); *Pan American World Airways, Inc. v. U.S.,* 371 U.S. 269, 9 L.Ed.2d 325 (1963).

3. Maintenance of an antitrust action for failure to apply to the FCC for a ruling or for failure to carry a signal on a CATV system, as alleged herein, poses a substantial danger that the defendants would be subjected to duplicative and inconsistent standards, as to the carriage of television signals on CATV systems. Additionally, a failure or refusal to seek an administrative decision that the public interest would be served by carriage of a signal cannot be a violation of the antitrust laws. Cf. *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965).

4. If the federal antitrust laws were applied to the question of carriage of television signals on CATV systems, the sophisticated regulatory program of the FCC would not work. The two statutory concepts are sufficiently mutually repugnant to compel the inferrence that Congress intended to repeal any antitrust laws otherwise applicable to the area of carriage. See, *Phonetele, Inc. v. American Telephone and Telegraph Company,* 435 F.Supp. 270 (C.D. Calif. 1977) ; *Dasa Corp. v. General Telephone Company of California;* 1977—2 Trade Cases ¶61,611 (C.D.Calif. 1977).

5. The Federal Communications Commission is vested with exclusive jurisdiction over questions of carriage of television signals by CATV systems; and Congress intended an immunity from antitrust attack for a refusal of carriage of a television signal on a CATV system. The statutory authority granted the FCC to regulate the carriage of CATV systems creates an exemption from the antitrust laws for any refusal of carriage, or refusal to apply for permission for carriage, at issue herein.

6. Any refusal by the defendants to carry the signal of the plaintiff on the CATV system of Community Cablevision Company in Odessa is justified by the policy embodied in the regulatory scheme enacted by Congress in

the Communications Act, and such activity is exempted from the antitrust law. See, *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975); see also, *Silver v. New York Stock Exchange,* 373 U.S. 341, 348-49 (1963).

7. The plaintiff lacks standing to complain in this antitrust court of any refusal of the defendants to carry its signal on the CATV system of Community Cablevision Company in Odessa, Texas, or to apply to the FCC for permission to do so. The Communications Act and the FCC regulation of carriage interposed itself between the defendants and the plaintiff as an arbiter of fair and "public interest" access by television stations to CATV systems. The plaintiff was not within the "target area"; and, as a matter of law, has not alleged antitrust injury, that is, the type antitrust laws were intended to prevent. See *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.,* 50 L.Ed.2d 701 (1977); *Jeffrey v. Southwestern Bell Telephone Company,* 518 F.2d 1129 (5th Cir. 1975).

8. There is no genuine issue as to material fact and the defendants are entitled to judgment as a matter of law.

9. The applicable statute of limitations, §4(b) of the Clayton Act, 15 U.S.C. §15(b), bars any cause of action accruing prior to April 26, 1970. *Zenith Radio Corp. v. Hazeltine Research Company, Inc.,* 401 U.S. 321 (1971). Moreover, since there was no signal of the plaintiff to be carried between March 16, 1971, and March 26, 1973, no claim for which relief can be granted may or can be stated for any failure or refusal of carriage during that period.

10. The FCC possessing exclusive jurisdiction, this court lacks jurisdiction under the antitrust laws, and the alleged events, activities, or transactions upon which the plaintiff relies are within exemptions or immunities from the antitrust laws.

11. The complaint, as amended, fails to state a claim for which relief can be granted.

12. The plaintiff lacks standing to assert that the events or transactions mentioned in its complaint constitute any violation of the Sherman Act.

13. For the foregoing reasons, this civil action should be dismissed and judgment entered for defendants.

SIGNED and ENTERED this ___ day of June, 1978.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MIDLAND TELECASTING COMPANY

v.

MIDESSA TELEVISION COMPANY, INC., et al.

No. MO-74-CA-47

ORDER AND JUDGMENT

Having considered the motion by Midessa Television Company, Inc. to dismiss and for judgment, together with the pleadings, affidavits, depositions, briefs and other documents on file, and the argument of counsel, and having this day made its findings of fact and conclusions of law, which are hereby incorporated by reference, the court enters this its order and judgment.

It is ORDERED, ADJUDGED and DECREED that Plaintiff Midland Telecasting Company take nothing as against defendants herein, and this civil action is hereby dismissed, with costs to be taxed against Plaintiff.

SIGNED and ENTERED this 13th day of June, 1978.

[SIG]

UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 78-2515

D. C. Docket No. MO-74-CA-47

MIDLAND TELECASTING COMPANY,
Plaintiff-Appellant,

VERSUS

MIDESSA TELEVISION COMPANY, INC., et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Before TUTTLE*, AINSWORTH and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

* Judge Tuttle did not participate in either the consideration or determination of this case.

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

May 29, 1980

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 78-2515

MIDLAND TELECASTING COMPANY,
Plaintiff-Appellant,

VERSUS

MIDESSA TELECASTING COMPANY, INC., ET. AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(June 25, 1980)

Before TUTTLE, AINSWORTH and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied

ENTERED FOR THE COURT:

[SIG.]

UNITED STATES CIRCUIT JUDGE

Supreme Court, U. S.
FILED
OCT 9 1980
MICHAEL RODAK, JR., CLERK

NO. 80-360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MIDESSA TELEVISION COMPANY, INC. ET AL,
Petitioners,

v.

MIDLAND TELECASTING COMPANY,
Respondent.

On Fetition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the exercise of federal antitrust jurisdiction over a cable television system's failure to carry to its subscribers a local broadcaster's signal is compatible with the Communications Act of 1934 and the First Amendment.

2. Whether a business decision by joint venturers owning a cable television system to refuse to carry their competitor's television signal is a "restraint of trade or commerce" within the meaning of the Sherman Act.

3. Whether a Court of Appeals should address claims under the Clayton Act that were not addressed by the trial court.

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions quoted in the Brief of Petitioner, Respondent would list the following, the pertinent portions of which will be quoted in full in the Appendix to this Brief.

Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. § 2.

Communications Act of 1934, 48 Stat. 1087, as amended, 47 U.S.C. § 313(a).

Selected provisions of Title 47, Code of Federal Regulations.

NO. 80-360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MIDESSA TELEVISION COMPANY, INC. ET AL,
Petitioners,

v.

MIDLAND TELECASTING COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Midland Telecasting Co., respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit in this case. That opinion is reported at 617 F.2d 1141.

STATEMENT OF THE CASE

1. Background

The allegations of plaintiffs' complaint.[1]

Respondent Midland Telecasting Company ("Midland")[2] has been licensed since 1961 to broadcast UHF television signals from Midland, Texas, on Channel 18. It was on the air from June 8, 1969, through March 16, 1971, and from March 26, 1973, through October 15, 1974.

Petitioners Midessa Television Company, Inc. ("Midessa") and Doubleday Broadcasting Company, Inc. ("Doubleday") operate VHF television stations in the Midland-Odessa, Texas, area and are, respectively the NBC and ABC affiliates in that market. They, Petitioners Hodge Enterprises and J. Edward Hodge (which own and operate theaters in Midland and Odessa), and Petitioner Cablecom-General, Inc. (which is in the business of owning and operating cable systems) formed Petitioner Community Cablevision Company of Odessa ("CCC") in 1968 as a joint venture.[3]

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1. On review of an Order dismissing a claim for its supposed failure to state a claim upon which relief can be granted, the allegations in plaintiff's complaint should be taken as true. City of Lafayette v. Louisiana Power & Light Company, 435 U.S. 389 (1978). The statement of background facts is therefore drawn directly from plaintiff's complaint. It might be noted that many of the allegations were not denied by one or more of the defendants. Any facts supported by defendants' admissions or the findings of fact in the trial court will be noted in the margin.

2. Midland was plaintiff in the trial court, and will occasionally be referred to as "plaintiff" in this brief.

3. See Answer of CCC to the Third Amended Complaint.

CCC was created for the express purpose of obtaining a franchise for, constructing, and operating a cable television system in Odessa. Before its conception, the several Petitioners had actively competed with one another for such a franchise. Rather than leave the spoils to the successful competitor, however, Petitioners agreed to drop the competitive mantle, form CCC, and share in the cable operation. CCC was successful in obtaining the franchise. It carried the broadcast signals of the broadcast Petitioners and two other television stations, one of which was an independent station from Dallas.[4]

From 1969 forward, Midland requested that CCC carry its UHF signal on the cable. Under the direction of Petitioners, CCC repeatedly refused to do so—that is, until after this suit was filed in May 1974.[5]

Midland's inability to have its signal carried on Petitioners' cable before that time doomed its broadcasting enterprise in the Midland-Odessa market. By the end of 1971, 36% of the homes in the Midland-Odessa area were serviced by Petitioners' cable. Excluded completely from this market, Midland was unable to generate sufficient advertising revenue to keep its UHF station afloat.

By effectively driving Midland out of business, Petitioners through CCC achieved their anticompetitive goal. Midland accordingly sought treble damages and attorneys' fees. Although it suffered an initial setback in the trial

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4. *See generally id.*

5. *See* Finding of Fact (g), in the unreported order, findings of fact, and conclusions of law of the United States District Court for the Western District of Texas (the trial court). The order, findings of fact and conclusions of law are reproduced in the Appendix of Petitioners' Brief at A-17 through A-23 and will be so cited hereinafter.

court, Midland's cause of action was vindicated by the United States Court of Appeals for the Fifth Circuit.

2. FCC Jurisdiction over Cable TV

Contrary to the overly broad conclusion of the Petitioners, Federal Communications Commission ("FCC") jurisdiction over the operation of cable television systems ("CATV") under the Communications Act of 1934 is significantly circumscribed.

a. Legal Authority for CATV Regulation—This Court first delineated the FCC's CATV jurisdiction in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). There the FCC had attempted to prohibit a cable system's retransmission of distant broadcast signals into the licensed contour of local stations. In a 5-4 decision, the Court upheld that exercise of authority. It held, however, that the FCC could regulate CATV only so long as that regulation was "reasonably ancillary" to its regulation of broadcast television under Title III of the Communications Act. 392 U.S. at 178.

On the basis of that decision, this Court recently struck down more ambitious FCC rules. *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). There the FCC rules at issue had required each of the largest cable systems to provide for leased access to at least one channel and to carry at least three public television stations. Applying the "reasonably ancillary" test, this Court held that the FCC had exceeded its "circumscribed range of [statutory authority] to regulate cable television." 440 U.S. at____, 99 S.Ct. at 1439.

b. The CATV Regulatory Scheme—The legal precedent shows that FCC authority over CATV is far from complete. Moreover, the FCC has exercised what author-

ity it does have over CATV signal carriage in a far less than comprehensive manner.

The first regulations applicable to all CATV systems were promulgated in 1966. *See Second Report and Order in Docket 14895*, 2 F.C.C.2d 725 (1966). One of the most important of these required cable systems upon request to carry the signals of local stations before the cable systems carried any others.[6] *See* 47 C.F.R. §§ 21.712(c); 74.1033(a); 74.1103(a); 91.559(a) (1967). Subject only to channel capacity, a cable could then carry any signal. The cable system was merely required to notify other stations and the FCC. *See* 47 C.F.R. § 74.1105 (1967). Thus, during the entire time when Midland's signal was first on the air from 1969 to 1971, there was no regulatory impediment to Petitioners' carriage of Midland's signal.[7] Except for other rules related to

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6. In FCC v. Midwest Video Corp., 440 U.S. 689 (1979), this Court distinguished these signal carriage rules from the public access rules, and held that the former requirements "did not amount to a duty to hold out facilities indifferently for public use and thus did not compel cable operators to function as common carriers." 440 U.S. at _____, 99 S.Ct. at 1445 n.16.

7. Section 74.1103(a) of the applicable regulations required a cable system to carry, on request of the stations involved, broadcast stations in a certain priority: first, all stations whose principal contours covered the community in which the cable was located, *see* 47 C.F.R. § 74.1103(a)(1) (1967); second, all stations within whose Grade A contours the cable was located, *see id.* at § 74.1103(a)(2); third, all stations within whose Grade B contours the cable was located, *see id.* at § 74.1103(a)(3); fourth, all stations that had local translators of a certain power, *see id.* at § 74.1103(a)(4).

Petitioners' brief, at pg. 4, characterizes Respondent's signal as "weak." Whether or not Respondent's signal had the characteristics that made carriage by CCC mandatory—and Respondents contends that it did—Respondent vigorously opposes Petitioners' attempt to raise this purely factual question since it was not resolved by the trial court. The important point is that between 1969 and 1971, there was no requirement whatsoever of FCC approval before CCC could commence carrying a given signal.

signal carriage, the FCC did not assume any further control over CATV; it did not regulate rates or entry into the market.

The first approval requirement for signal carriage was not adopted by the FCC until February 2, 1972, and did not become effective until March 31, 1972. *See Cable Television Report and Order,* 36 F.C.C.2d 1 (1972). It read:

> No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission.

47 C.F.R. § 76.11(a) (1973).

The signal carriage requirements for local stations were substantially revised so as to make the determination whether a local signal had to be carried turn on more objective criteria than the strength of the signal in question.[8] *See* 47 C.F.R. §§ 76.57(a); 76.59(a); 76.61(a) (1973). At the same time, the FCC clearly indicated that the establishment of such objective criteria would make the issuance of a certificate of compliance a simple,

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8. For example, cable systems operating in a "smaller television market" such as Odessa, had to carry, upon request of the station involved, not only signals of stations within whose Grade B contours the system was located, *see* 47 C.F.R. § 76.59(a)(3) (1973), but also signals of stations licensed to a community whose reference point was within a 35-mile radius of any part of the community served by the cable system (the "specified zone of a television broadcast station" as defined in § 76.5(f)), *see id. at* § 76.59(a)(1), and signals of stations licensed to communities generally considered to be part of the same smaller television market (a "hyphenated market"), *id.* at § 76.59 (a)(4). It is undisputed that Respondent was licensed to serve Midland, that the reference point of Midland was within a 35-mile radius of Odessa, and that Midland-Odessa was a hypenated market.

prompt, and almost ministerial act.[9] Other regulatory requirements—for example, mandatory program origination—were added, but the FCC still exercised no general regulatory control over rates and services through the certificate of compliance process. Indeed, all existing systems were permitted to operate until 1977 without such a certificate. *See* 47 C.F.R. § 76.11(b) (1973).

Quickly, however, the FCC recognized that the certificate process created undesired limitations on the carriage of local signals. Effective December 1, 1973, the FCC permitted addition of certain local signals by a mere registration procedure, thus rescinding its prior approval powers. *See Order,* 38 Fed. Reg. 33,398 (Dec. 4, 1973); 47 C.F.R. § 76.11(a) (1973). For several months before it finally carried Midland's signal, therefore, the Petitioners' cable could have added that signal to its system merely by registering the change without having to obtain

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9. In its report accompanying the issuance of the new rules, the FCC stated:

> Absent special situations or showings, requests consistent with our rules will receive prompt certification. The rules will operate on a 'go, no-go' basis—i.e., the carriage rules reflect our determination of what is, at this time, in the public interest with respect to cable carriage of local and distant signals. We will, of course, consider objections to signal carriage applications and have retained special relief rules, but those seeking signal carriage restrictions on otherwise permitted signals have a substantial burden. Before restrictions are imposed in such cases, there will have to be a clear showing that the proposed service is not consistent with the orderly integration of cable television service into the national communications structure and that the results would be inimical to the public interest. We have during the course of this proceeding fully considered the question of impact on local television service and we do not expect to re-evaluate that general question in individual cases. And, for the same reason, we have no intention of re-evaluating on request of cable systems in individual proceedings the general questions settled in our carriage and exclusivity rules.

36 F.C.C.2d at 46-47.

prior FCC approval. Once again, if anything, they appear to have been required to do so under the FCC signal carriage rules.[10]

The FCC has stated that the purpose underlying its rules about carriage of local signals is to aid local UHF broadcasters like Midland. In its 1972 Cable Report the FCC said:

> All systems must carry, on request, the signals of all stations licensed to communities within 35 miles of the cable system's community. This requirement based on policy considerations similar to those underlying existing carriage rules, is intended to aid stations—generally UHF—whose Grade B contours are limited. In this manner less powerful stations will be able to compete with more powerful stations in the same market more effectively than they could under our old carriage rules; they will be capable of extending their coverage into the area that we have determined is generally necessary for the development of broadcasting stations.

36 F.C.C.2d at 34. The express policy of the FCC thus ran counter to the exclusion of Midland's signal from Petitioners' cable and thus parallel to Midland's antitrust claims.[11]

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10. As noted above, the purpose of this discussion is not to demonstrate conclusively that Petitioners were required to carry Midland's signal, but merely to show how little the approval requirement (when it was in effect) interfered with and how seldom the FCC felt it necessary to oversee the addition of new signals, especially local signals. It is also significant to note that Midland, rather than seeking to enforce the antitrust laws in a manner repugnant to the regulatory scheme, is contending that Petitioners' concerted refusal to deal, if not *per se* unlawful, was unreasonable because it contravened the regulatory requirements of carriage.

11. The FCC's recent action concerning its control over CATV is most telling. The FCC has in fact proposed substantial deregula-

3. Ruling of the Courts Below

Without conducting any review of this regulatory scheme, the trial court signed the findings and conclusions drafted by Petitioner Midessa.[12] Those conclusions held that the CATV regulatory scheme is "pervasive," at least with respect to the "narrow and discrete" question of signal carriage. The conclusions also held that the antitrust laws and the regulatory scheme provided for in the Communications Act are "mutually repugnant." Consequently, the conclusions stated that the regulatory system would not work if Midland were permitted to pursue its antitrust lawsuit. On the basis of these conclusions, the trial court ruled that the Petitioners' conduct is immune

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tion of CATV. *See Notice of Proposed Rulemaking*, 43 Fed. Reg. 30,845 (July 18, 1978). In this notice, the FCC proposed to "eliminate the Certificate of Compliance process" in part because the FCC perceived that this process and others had been subject to "abuse" . . . for anticompetitive or other improper purposes. . . ." *Id.* at 30,846.

12. *See Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141, 1144 and n.5 (5th Cir. 1980). One of those findings was that defendants were required to seek approval from the FCC before adding Midland's signal to the cable. See Brief of Petitioners at A-18. The preceding section of this brief should demonstrate how erroneous that finding is. Of course, though denominated as a "finding of fact," it is actually a conclusion of law that should have no binding effect on this Court.

Nevertheless, since Midland believes that the existence or absence of a requirement of prior administrative approval is immaterial to the issues presented by this appeal, Midland will assume, for the purpose of its argument, that at all times pertinent to the appeal, it was necessary for CCC to obtain FCC approval before adding Midland's signal. Obviously, if this Court should determine that the requirement of prior administrative approval has some bearing on the question whether Midland has a cause of action under the antitrust laws, then at the very least this case should be remanded for the trial of Midland's claims that Petitioners unlawfully refused to carry its signal at the times when no administrative approval was necessary; to wit, prior to March 31, 1972, and subsequent to December 1, 1973.

from attack under the antitrust laws. Included in the conclusions signed by the trial court were holdings that Midland has no valid claim for Petitioners' failure to seek approval for the carriage of its signal, and that Midland has no standing to sue for violations of the antitrust laws.

The United States Court of Appeals for the Fifth Circuit reversed in *Midland Telecasting Company v. Midessa Television Company*, 617 F.2d 1141 (5th Cir. 1980). Following clear precedent in this Court, the Court of Appeals recognized longstanding judicial reluctance to find repeals of the antitrust laws by implication, *id.* at 1145, and, after a thorough review of the regulatory scheme at issue, found no repugnancy between the FCC carriage rules and antitrust principles, *see id.* at 1148, and no justification for any implied antitrust immunity, *id.* at 1149.

Further, the Court of Appeals recognized that Midland was "the target of the conspiracy" alleged in the complaint, *see id.*, and held that Midland had standing under Section 4 of the Clayton Act, 15 U.S.C. § 15. Since the trial court failed to address the applicability of Section 7 of the Clayton Act, 15 U.S.C. § 18, to the facts alleged by Midland, the Court of Appeals understandably and properly did not rule on that issue.

The only First Amendment claim made by Petitioners in the trial court and in the Court of Appeals concerned the *Noerr-Pennington* doctrine.[13] Because Petitioners made no effort to influence governmental action within the meaning of that doctrine, the Court of Appeals rejected

13. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

its applicability in this case. *See id.* at 144 n.6. In light of Petitioners' brief it should be emphasized that Petitioners never made any arguments to the trial court or to the Court of Appeals based on editorial discretion or any other First Amendment considerations.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THERE ARE NO IMPORTANT QUESTIONS OF FEDERAL LAW IN THIS CASE THAT HAVE NOT BEEN SETTLED BY THIS COURT.

This Court's decision in *United States v. Radio Corp. of America,* 358 U.S. 334 (1958), is dispositive of this case. There, the FCC had approved an exchange of television broadcast stations. The Justice Department, which had participated in the FCC hearings, sued to enjoin the exchange in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Refusing to accept the argument of Radio Corporation of America ("RCA") that the exchange was immune from antitrust attack, the Court held that neither the Communications Act nor FCC approval of the exchange created such immunity. Here, the Court of Appeals correctly followed the *RCA* decision and found no antitrust immunity for the activities of Petitioners. *See* 617 F.2d at 1148-49.

The Supreme Court's decision in *RCA* rested on two considerations, each of which would alone be dispositive of the immunity issue in this or any other broadcast case. First, the language of the Communications Act itself expresses unequivocally Congress' intention that the Act confer no antitrust immunity on broadcast entities. Second, the legislative history of the Act confirms this

literal reading of the statute: no antitrust immunity whatsoever is to be derived from the Act insofar as broadcasting is concerned.

FCC control over both broadcasting and CATV derives from Title III of the Communications Act. *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *United States v. Southwest Cable Co.*, 392 U.S. 157 (1968). An integral part of that title is Section 313(a) of the Act, which begins:

> All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to . . . radio [i.e. broadcast] communications.

47 U.S.C. § 313(a).

This plain and unambiguous legislative language alone demonstrates conclusively that no antitrust immunity flows from Title III. Moreover, Section 313(a) goes on to provide:

> Whenever in any suit . . . , civil or criminal, brought under [the antitrust] laws, . . . , any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, *in addition to the penalties imposed by said laws,* may adjudge, order and/or decree that the license of any licensee shall . . . be revoked.

Id. (emphasis added).

In other words, an antitrust court is given powers at least equal to those of the FCC over the broadcast licenses granted by the FCC. Nothing could make it more clear that Congress intended that no immunity from anti-

trust suit be derived from FCC regulation under this legislation.

The legislative history of the Communications Act is equally compelling. In the words of the Supreme Court in *RCA*, that history "reveals that the [FCC] was not given the power to decide antitrust issues as such,[14] and that *Commission action was not intended to prevent enforcement of the antitrust laws in federal courts.*" 358 U.S. at 346 (emphasis added). *A fortiori, CCC's inaction,* induced by a conspiracy between Midland's competitors, *cannot* be the basis for preventing enforcement of the antitrust laws. *RCA* is the definitive construction of the Congressional intent embodied in Title III of the Communications Act: there simply is no implied antitrust immunity for broadcast entities—radio, television or cable.

Nothing in CATV regulation or the particular facts of this case warrants a result different from that reached in *RCA*. Indeed, the factual setting here presents an even weaker case for immunity than the situation in *RCA*.

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14. The Supreme Court's recent decision in the media cross-ownership case, FCC v. National Citizens Committee for Broadcasting, Inc., 436 U.S. 775 (1978), does not suggest anything to the contrary. There the Court upheld the FCC's decision not to require that existing broadcast stations divest any interest in daily newspapers in the station's community despite the FCC's decision to prohibt such common ownership prospectively. At first blush, this might appear to uphold a decision by the FCC on antitrust issues. But that is not the case.

The Court expressly noted that in reaching its respective decisions, the FCC had found that "newspaper-broadcast combinations . . . are not harmful to competition." *Id.* at _____, 99 S.Ct. at 2107. Instead the Court held that the agency decision on divestiture of existing combinations was supported by the rational balancing of two factors: "local diversity" of broadcast origination versus "disruption of the industry" attendant to divestiture. *Id.* at _____, 99 S.Ct. at 2107-08. Even in a case involving divestiture, therefore, the FCC's decision—upheld by the Court—had little to do with antitrust issues.

As noted above, the CATV regulation presently at issue is merely "ancillary" to the *direct* FCC regulation of television broadcasting at issue in *RCA*. In addition, in *RCA* not only were the parties required to seek FCC approval, but the FCC had already approved the conduct at issue; here the Petitioners base their immunity argument on the mere claim that they would have had to seek FCC approval to carry Midland's signal. For these two reasons, there is even less of a basis for finding implied antitrust immunity in this case than there was in *RCA*—and in *RCA* the Supreme Court found none at all.

Unlike the trial court, which did not cite and indeed ignored *RCA* altogether,[15] the Court of Appeals correctly recognized, under *RCA's* unassailable terms, that defendants' antitrust violations carry no immunity from suit by reason of FCC regulation of CATV under Title III of the Communications Act. On this ground alone, the writ should be denied.

Alternatively, if this Court should conclude that the case raises significant legal issues, Midland respectfully submits that these issues should not be decided on as incomplete a record as is present in this case. Rather, the decision should be made after a complete record is built in the trial court on an appeal from a jury trial.

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15. Petitioners' brief, at page 12, weakly characterizes the *RCA* decision as "inapplicable" without explaining why it should be so regarded. Apparently, Petitioners believe that subsequent decisions of this Court have somehow overruled *RCA sub silentio*. This contention is addressed *infra*. It should be noted here, however, that all district court decisions facing the issue to date have followed *RCA* as the controlling precedent. *See* United States v. National Broadcasting Co., 449 F.Supp. 1127 (C.D. Cal. 1978); United States v. CBS, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,327 (C.D. Cal. 1977); First Delaware Valley Citizens Television, Inc. v. CBS, Inc., 398 F.Supp. 917 (E.D. Pa. 1975) (claims under Sherman Act §§ 1 & 2 and Clayton Act § 7).

2. THE COURT OF APPEALS' DECISION IS IN COMPLETE HARMONY WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. The Regulatory System Will Work Effectively If The Antitrust Laws Are Enforced Against CATV Systems in Court.

Contrary to Petitioners' assertions, the Court of Appeals' decision is completely consistent with opinions of this Court issued subsequent to *RCA*. In several recent cases this Court has established some central principles by which consideration of possible antitrust immunity is to be guided.

But legislative intent remains the key; a court must consider whether federal legislation "was intended by Congress to leave [antitrust] supervision" of an industry to an administrative agency. *Gordon v. New York Stock Exhange, Inc.*, 422 U.S. 659, 691 (1975); *accord, Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595 (1976). Here, legislative intent is clear. As the *RCA* decision held, Congress intended that Title III of the Communications Act confer no antitrust immunity on the broadcast industry. *RCA* is thus fully consistent with these most recent holdings in *Gordon* and *Cantor* that legislative intent is dispositive.

If legislative intent is unclear, a court may find that the requisite intent to immunize regulated conduct from antitrust attack is to be implied[16] from the terms of the statute at issue or from the extent of regulation under-

16. No Petitioner has ever claimed, nor did the courts below find, that there is any express legislative immunity conferred upon the antitrust violations of Petitioners.

taken by an agency pursuant to that statute. But even then a court may not do so lightly, for "antitrust immunity is not favored." *United States v. National Association of Securities Dealers,* 422 U.S. 694, 719 (1975).[17] By the Court's own account, it "has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.' " *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 597 (1976), quoting from *Otter Tail Power Co. v. United States,* 410 U.S. 366, 391 (1973); *accord, Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659, 683 (1975).

The trial court made no effort to show how this lawsuit or any other antitrust suit would interfere with the CATV regulatory system; the court's conclusions just say that they would. As the Court of Appeals properly recognized, *see* 617 F.2d at 1145, this is not the stringent showing required to support a finding of immunity.

The trial court relied on an imagined signal carriage approval requirement in reaching the conclusion that the "sophisticated regulatory program of the FCC would not work" if the antitrust laws were applied in this case. As a matter of law, however, an approval requirement alone is insufficient to support immunity.

The most recent Supreme Court decision on immunity, *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976), demonstrates this principle conclusively. There the plain-

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17. This Court recently issued two decisions in which it likewise indicated a steadfast unwillingness to permit expansive interpretations of express legislative antitrust immunities. *See* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978); National Broiler Marketing Ass'n. v. United States, 436 U.S. 816 (1978).

tiff brought suit alleging that the defendant utility had attempted to monopolize the sale of light bulbs in Michigan by means of a light bulb exchange program. That program had been approved by the Michigan Public Utilities Commission, and the defendant would have had to seek approval from the Commission to abandon it. In the eyes of the Court, that in itself did not immunize the program from antitrust attack. Applying principles of immunity identical to those applied to federal regulation, this Court ruled that Michigan's regulatory program would not be "impaired" by application of the antitrust laws to the defendant's conduct, and held as follows:

> We conclude that neither . . . approval . . . nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program.

Id. at 598. Here, the FCC never approved the exclusion of Midland from Petitioners' cable. Thus, there is even less reason for implying any antitrust immunity from the supposed approval requirement alone.

Once again, the leading Supreme Court case on point should be dispositive; no immunity is to be implied from a mere approval requirement (even when that approval requirement exists). Thus, the Court of Appeals, unsurprisingly, found Petitioners' approval requirement argument to be "without merit."[18] *See* 617 F.2d at 1148.

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18. The Court of Appeals, on the authority of Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 224 (1966); *RCA*, 358 U.S. at 352 (1959); and Mid-Texas Communications, Inc. v. American Tel. & Tel., Inc., 615 F.2d 1372, 1380 (5th Cir. 1980), also correctly refused to require Midland to exhaust its administrative remedies before bringing this action.

Out of an abundance of caution, however, we will continue to answer each point in Petitioners' brief. There are two premises in that misguided analysis for the proposition that the regulatory scheme will not work if Midland's antitrust suit is permitted to proceed. First, according to Petitioners, there is some repugnancy between the antitrust laws and the regulatory scheme at issue, a conflict that somehow raises the spectre of inconsistent standards. Second, according to Petitioners, the regulatory scheme is pervasive. Petitioners are wrong on both counts.

(1). There Is No Repugnancy Between FCC Control Over CATV and the Antitrust Laws.

Only a "convincing showing of clear repugnancy between the antitrust laws and the regulatory system" will justify a finding of immunity. *United States v. National Association of Securities Dealers,* 422 U.S. 694, 719-20 (1975). Petitioners, while citing *N.A.S.D.*, do not come close to making the required showing; they merely announce in a conclusory fashion that such repugnancy exists. Since the required clear showing is absent, the Court of Appeals correctly reversed the trial court and held that

> no repugnancy exists between the FCC carriage rules and antitrust principles. If the refusal [to carry Midland's signal] violated antitrust laws, a finding of liability would not undermine or conflict with the regulatory scheme.

See 617 F.2d at 1148. Respondents respectfully submit that Petitioners' argument based on an "irreconcilable conflict," *see* Brief of Petitioner at 14, between the regu-

latory scheme and the antitrust laws is simply without merit.

In fact, as the Court of Appeals found, there is no conflict at all:

> Given the FCC's policy to promote UHF broadcasting, the regulatory and antitrust principles are, in fact, complimentary.

Id. Midland contends that, by refusing to carry its UHF signal, Petitioners violated at the same time both the FCC's CATV regulations requiring carriage of local signals and the antitrust laws. The regulatory scheme and the antitrust laws in this instance are thus virtually coextensive. They are far from "mutually repugnant."

Moreover, in *N.A.S.D.* (a 5-4 decision with the dissenters opposing immunity), on which the Petitioners rely, this Court concluded that statutory authorization for the challenged restrictions on the resale of mutual fund shares was irreconcilable with the principle that such restrictions are *per se* violations of the antitrust laws and held that they were immune from antitrust attack. There is no similar authority in the Communications Act for excluding local stations from cable systems. Consequently, there should be no immunity similar to that found in *N.A.S.D.* for the exclusionary conduct in this case.

Likewise, in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), on which the Petitioners also rely, this Court rejected a challenge to stock exchange rules fixing commission rates and focused on Section 19 (b)(9) of the Securities Exchange Act of 1934, which authorized the SEC to oversee exchange rules fixing com-

mission rates. The Court concluded easily that "failure to imply repeal [of the antitrust laws] would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates." *Id.* at 691. Once again, there is no similar provision in the Communications Act for FCC supervision of cable exclusion of local television signals. A failure to imply antitrust immunity here would be perfectly proper.

Professors Areeda and Turner put it this way:

> The legislature's purpose in creating a regulatory regime bears on the existence or scope of an antitrust immunity. That purpose will sometimes be clear. Where competition is impossible, regulation is often adopted as a substitute for missing market forces. In such "natural monopolies" regulation is expected to control prices and profits and also to promote efficiency and innovation. But that regulatory premise does not necessarily embrace the achievement of a monopoly in components that could be competitively produced to supply the public utility. Similarly, *the necessity of preventing physical interference among broadcasters does not necessarily compel restraints on the competition of cable television operators.*

1 P. Areeda and D. Turner, Antitrust Law ¶ 223, at 138 (1978) (emphasis added). In essence, what these antitrust scholars are saying is that there is no reason that market forces—and, correspondingly, the application of the antitrust laws—should be supplanted in the regulation of CATV. That is precisely Midland's position here.

As a final matter, it should be clear that nothing in CATV regulation is incompatible with Midland's suit or with the antitrust laws in general. The FCC has made

a determined effort to see that all cable systems carry all local signals. Nothing about that effort is in conflict with the prohibition of the antitrust laws against group boycotts, concerted attempts to monopolize, or mergers that lessen competition, particularly when those laws are sought to be enforced by a local station driven out of business by a cable system's blatant disregard of the FCC regulations designed to protect the local station. There is no necessary repugnancy whatsoever between CATV regulation and the antitrust laws. No immunity should be implied on this ground.

(2). FCC Regulation of CATV Is Not Pervasive.

As noted above, in deciding the implied immunity issue a factor may be "whether [an agency's] exercise of regulatory authority is . . . pervasive." *N.A.S.D.*, 422 U.S. at 730 (1975). Petitioners argue that the regulatory scheme at issue here is complete and pervasive, and cite *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). Unfortunately for Petitioners, this Court recently distinguished the cited case and held that Congress has conferred on the FCC only a "circumscribed range of power to regulate cable television." *FCC v. Midwest Video Corp.*, 440 U.S. 689, ____, 99 S.Ct. 1435, 1439 (1979). No provision of the Communications Act establishes any extensive FCC authority over CATV; there is no provision of the Act that even speaks to CATV. There is no showing of the requisite pervasiveness of regulatory authority.

The *RCA* decision is precisely on point. Even with respect to broadcasting, the Communications Act creates "no pervasive regulatory scheme." *RCA*, 358 U.S. at 350. Of course, the FCC had attempted to exercise complete

control over the particular exchange of stations at issue in *RCA*—it had approved the exchange. But even this exercise of complete control over the transaction in issue was not deemed by the Court to be an exercise of "pervasive" control.

The FCC's authority over CATV is even less extensive than the regulation of broadcasters that the Court held not to be pervasive in *RCA*. It likewise cannot be deemed pervasive. Immunity should not have been implied from the FCC's restricted control over CATV. The writ therefore should be denied.

B. Midland's Allegation That Defendants Engaged In A Group Boycott By Refusing To Request Administrative Approval For The Carriage Of Plaintiff's Signal States A Valid Cause Of Action Under The Antitrust Laws.

Without raising the issue at *any* stage in the proceedings below, Petitioners in their brief to this Court attempt nebulously to argue "significant constitutional implications," *see* Brief of Petitioner at 19, presumably based on notions of editorial discretion. Midland is appalled at this effort to persuade this Court to decide a constitutional issue that no other court involved in the case has had an opportunity to consider, and Midland is confident this Court will not allow Petitioners to make such an end run around an orderly appellate review process.

Regarding the only First Amendment argument raised below, the Court of Appeals properly held inapplicable the *Noerr-Pennington* doctrine, since the doctrine is based on the need "to protect efforts directed to government officials for the purpose of seeking redress," and no such effort was made here. 617 F.2d at 1144 n.5.

Respondents submit that the Court of Appeals' reasoning was correct and consistent with the decisions of this Court. For example, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the defendant was sued for having failed to seek approval from the Michigan regulatory commission to abandon its monopolistic light bulb program. The Court would never have reached the immunity issue there if the plaintiff could not in any event have stated a valid claim against the failure to seek an administrative decision. The plaintiff in *Cantor* was permitted to make that antitrust claim; Midland submits that its claim is equally valid here.

Petitioners continue to rely on *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and on *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), which held that an affirmative effort to influence public officials does not violate the antitrust laws. Nowhere, however, has it ever been held that a concerted refusal to deal is exempted from the antitrust laws merely because a decision to deal would require subsequent administrative approval. There is a significant difference between jointly seeking to influence administrative action and jointly refusing to do so. In the case of an effort to influence public decisionmaking, First Amendment rights are exercised, and a decision is reached. When a group of competitors refuse to seek a decision, they do not exercise their First Amendment rights, the decisionmaker is never confronted with the issue, and public policy is never brought to bear on the potential problem.

Likewise, Petitioners in this case, by jointly refusing to seek FCC approval to carry Midland's signal, were not seeking to exercise First Amendment rights but rather

were able "to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp [the] decision-making process." *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 512 (1972).[19] Had the Petitioners here jointly petitioned the FCC to be relieved of any regulatory requirement that CCC had to carry Midland's signal, and were Midland here complaining of such action, then the *Noerr-Pennington* doctrine might give them some solace. But that is not this case. Therefore, Midland's complaint states a valid cause of action, and the writ should be denied.

C. Plaintiff Has Standing To Bring This Antitrust Lawsuit.

The conclusions signed by the trial court say that "plaintiff [Midland] lacks standing to complain . . . of any refusal of the defendants [Petitioners] to carry its signal on the CATV system . . . [because] plaintiff was not in the 'target area' . . . and has not alleged antitrust injury, [i.e.,] the type antitrust laws were intended to

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19. While the FCC regulations provided a procedure by which a broadcaster might seek an order compelling a cable system to carry its signal (*e.g.,* 47 C.F.R. § 74.1109 (1967) and 47 C.F.R. § 76.7 (1973)), it is clear that this procedure was much more complicated and time consuming than the certificate of compliance one and that the regulatory scheme placed the burden of seeking approval of carriage on the cable system rather than the broadcast licensee. In any event, the regulations affirmatively required that where a request for carriage had been made by a broadcaster entitled to carriage, the cable system had to provide the carriage unless it filed a petition for waiver within 15 days of the request. *See* 47 C.F.R. § 76.7(g) (1973). A concerted refusal to invoke administrative action where the applicable regulations command that it be sought is no more immune from antitrust scrutiny than a concerted attempt to invoke administrative action on the basis of false information. *See* Woods Exploration & Producing Co. v. Aluminum Co., 438 F.2d 1286 (5th Cir.), *cert. denied,* 404 U.S. 1047 (1971).

prevent." Brief of Petitioners at A-21. This preposterous conclusion was rejected by the Court of Appeals, which found that

> Midland, under the allegations in its complaint, was the *target* of the conspiracy and as such is an adequate representative of that sector of the economy which is threatened by the alleged anti-competitive acts of the defendants. As such, Midland has standing under section 4 [of the Clayton Act, 15 U.S.C. § 15].

617 F.2d at 1145 (emphasis added.)

A business boycotted by its competitors is well within the "target area" of the boycott; it *is* the target. And the boycotted competitor has standing to sue for damages caused by the boycott under Section 1 of the Sherman Act. This has been an unassailable tenet of private antitrust litigation from the earliest date. *See Montague & Co. v. Lowry,* 193 U.S. 38 (1904); *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959).

The same can be said for a suit alleging that a business has deprived a potential or actual competitor of access to a facility, like Petitioners' cable system, essential to effective competition. The excluded competitor has standing to sue for damages caused by the exclusion under Section 2 of the Sherman Act. *See, e.g., Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 993 n.44 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956.

The parameters of standing under Section 7 of the Clayton Act have not been so clearly delineated. Midland submits that when a competitor is precluded access to a facility that is created by a horizontal merger of all of the remaining competitors and is essential to effective

competition, the excluded competitor has standing to sue the merging competitors. The merger enables the merging parties to destroy the competition of the excluded competitor. That excluded competition is the target of the merger. And the excluded competitor has standing to sue under Section 7. *See Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 985 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978).

The cases cited by Petitioners in support of their standing argument in no way preclude standing for Midland here. Petitioners rely first on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). There the plaintiff, an operator of bowling centers, sued the defendant under Section 7 of the Clayton Act for merging with a competitor and thereby enabling that competitor to remain in business to the detriment of the plantiff. It can be seen immediately that the case has no relevance to the garden variety Sherman Act counts of plaintiff's complaint, on which plaintiff should have indisputable standing. Even as to plaintiff's Section 7 count, *Brunswick* does not preclude standing here. There, the only injury plaintiff sustained as a result of the merger was increased competition from the merged company. Here, Midland complains of an injury incurred because its competitors pooled their assets to acquire a facility essential to the survival of a broadcaster and then collaborated to bar Midland from access to that facility, the collaboration resulting in injury to competition by virtue of Midland's forced exit from the market. Since Midland clearly had standing to challenge this collaboration (both in the formation and operation of CCC) under Section 1 of the Sherman Act, it is difficult to see how Midland could be

denied standing to raise the same allegations under the provisions of Section 7.

Petitioners also cite *Jeffrey v. Southwestern Bell Telephone Co.*, 518 F.2d 1129 (5th Cir. 1975). There, consumers of telephone services sued the defendants for conspiracy to destroy competition in the market for telephone equipment. The plaintiffs contended the defendants raised residential rates in order to finance its below cost sales of equipment. The Fifth Circuit held that the consumers had no standing to sue:

> The antitrust conspiracy . . . was aimed at manufacturers, sellers, and lessors of telephone equipment. . . . [A]ppellants are located far from the target area. . . .

Id. at 1131.

Jeffrey might stand for the proposition that the subscribers of Petitioners' cable have no standing. It could not indicate more clearly, however, that a business in Midland's position—like the manufacturer of telephone equipment in *Jeffrey*—does have standing. There being no error in the Court of Appeals' opinion on the standing issue, the writ should be denied.

3. THERE IS NO NEED FOR THIS COURT TO EXERCISE ITS POWER OF SUPERVISION BECAUSE THE COURT OF APPEALS CORRECTLY DECLINED TO RULE ON THE APPLICABILITY OF SECTION 7.

Section 7 of the Clayton Act, was not mentioned in the conclusions signed by the trial court. Thus, the Court of Appeals correctly held that the issue of the applicability

of Section 7 to the facts alleged in this suit was not properly before it on appeal and issued no holding on that point.

It is true that the trial court, in its findings of fact, stated that "the plaintiff does not assert or claim any antitrust injury by reason of the conception or creation of Community Cablevision Company or of its efforts to induce the City Council of Odessa to grant it a franchise, or of the actual granting of such franchise of such city." Brief of Petitioner at A-18. That does not rise to a holding that Section 7 is inapplicable.

Petitioners seem to argue that because the trial court dismissed the entire case, it passed upon Midland's Section 7 contention. Midland respectfully submits that the Court of Appeals should not be taken to task for failing to divine reasons not stated by the trial court for its ruling. This point affords a singularly inappropriate occasion for the exercise of this Court's supervisory power.

Even if the issue were before the Court, Petitioners' position should not be accepted. Section 7 applies to joint ventures. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). The three corporations that formed CCC—along with the two individuals—clearly acquired assets of the others in doing so. This is all that is required to meet the plain words of the statute. None of the cases cited to the trial court by Petitioners involve joint ventures with more than a single corporate venturer. Those joint ventures are clearly not covered by the statute, whereas Petitioners' joint venture, comprised as it is of more than one corporation, is unambiguously covered. Plaintiff's Section 7 claim is perfectly valid.

Petitioners also argued to the trial court that this claim is barred by the statute of limitations because the joint venture was formed more than four years before the filing of Midland's complaint. Once again, they are wrong. The statute of limitations does not begin to run until the plaintiff suffers antitrust injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). Each time the joint venture refused carriage of Midland's signal, a new cause of action accrued to it. *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975). Those refusals fell well within the limitations period. Midland's claims under Section 7 are therefore not time-barred, and the writ should be denied.

CONCLUSION

Since the decision by the Court of Appeals is in complete harmony with the applicable decisions of this Court and with those of other courts considering similar questions, Midland respectfully urges the Court to decline the invitation to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Communications Act of 1934, 48 Stat. 1087, as amended, 47 U.S.C. § 313(a):

> All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the

decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

47 C.F.R. § 21.712(c) (1967):

(c) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the station operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

47 C.F.R. § 74.1103(a) (1967):

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station;

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system with 100 w or higher power.

47 C.F.R. § 74.1033(a) (1967):

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

47 C.F.R. § 91.559(a) (1967):

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contour the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

47 C.F.R. § 76.11 (1973):

(a) No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission. . . .

(b) No cable television system lawfully carrying television broadcast signals in a community prior to

March 31, 1972, shall continue carriage of such signals beyond the end of its current franchise period, or March 31, 1977, whichever occurs first, unless it receives a certificate of compliance.

(c) A cable television system to which paragraph (b) of this section applies may continue to carry television broadcast signals after expiration of the period specified therein, if an application for certificate is filed at least thirty (30) days prior to the date on which a certificate would otherwise be required and the Commission has not acted on the application.

(d) A certificate of compliance that is granted pursuant to this section shall be valid until the unamended expiration date of the franchise under which the certificated cable television system is operating or will operate, unless the Commission otherwise orders. A cable system may continue to carry television broadcast signals after the expiration of its certificate, if an application for a new certificate is filed at least thirty (30) days prior to the expiration date of the existing certificate and the Commission has not acted on the application.

47 C.F.R. § 76.59(a) (1973):

Provisions for smaller television markets—A community unit operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(3) Commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community of the community unit is located, in whole or in part;

(4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vermont-Plattsburgh, New York television market);

(5) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations, or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station;

(6) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.